Filed 5/18/09 Luchs v. Pro Tect Management Corp. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOSHUA LUCHS, Plaintiff and Appellant, v. PRO TECT MANAGEMENT CORP., et al., Defendants and Respondents.	B201186 (Los Angeles County Super. Ct. No. BC 328269)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County. Harold L. Cherness and Ruth A. Kwan, Judges. Affirmed.

Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Plaintiff and Appellant.

Howard F. Silber for Defendants and Respondents.

Plaintiff Joshua Luchs appealed from a judgment in favor of defendants Pro Tect Management Corp. (Pro Tect) and Gary Wichard. Luchs is a sports agent who entered into a written contract with Pro Tect to recruit football players. Luchs contends the court's refusal to enter Pro Tect's default judgment was error, the jury was erroneously instructed about the legal relationship between Pro Tect and Wichard, and the jury's finding Wichard did not breach the contract was not supported by substantial evidence. Luchs also appeals from the order awarding attorney's fees to Wichard, contending Wichard was not entitled to attorney's fees. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Factual Background[1]

A. The Contract

In 1990, Luchs became a registered sports agent or contract advisor and started representing National Football League (NFL) players. Luchs first worked with sports agent Harold "Doc" Daniels. After marrying, Luchs began looking for an organization which could offer him greater stability.

In 2000, Luchs approached Wichard, a highly respected sports agent who operated Pro Tect, and inquired about employment opportunities. After extended discussions, Wichard concluded Luchs' success in recruiting football players in the Pacific and Mountain regions complemented Pro Tect's needs, and Luchs and Pro Tect entered into a written contract (the Agreement).

---

[1] In their statements of facts, defendants include terms and facts the court ordered them not to use and Luchs cites evidence in his favor.

Under the Agreement, Luchs was an independent contractor, receiving no salary or benefits. Rather, Luchs recruited football players for Pro Tect and received a portion of its three percent commission. In relevant part, the Agreement provided:

> Luchs shall receive twenty-five [percent] (25%) of the commissions received by Pro Tect from any new business generated from players who attend college in the Pacific and Mountain time zones, excluding the University of Utah and including the State of Nebraska (the "Players"). Luchs shall be entitled to his share of any amounts received by Pro Tect as a result of its representation of the Players. Nothing herein shall prohibit the parties from agreeing, in writing, to extend the agreements to players who do not attend college in the Pacific and Mountain time zones, which shall also be known as the "Players."

Under the Agreement, Luchs' payments from Pro Tect were to be "reduced by twenty-five [percent] (25%) of the 'costs of recruitment,'" as well as by "twenty-five [percent] (25%) of any unreimbursed expenses which [Pro Tect] incurs or advances on behalf of any of the Players."

Payments to Luchs were to be made within 10 business days of Pro Tect's receipt of funds, at which time Pro Tect was required to provide Luchs an itemized list of expenses being deducted from the amounts paid.

The Agreement could be terminated immediately for "cause." If Pro Tect terminated the Agreement for cause, a defined term, Luchs forfeited his right to his share of any future commissions. "Cause" included "any act involving dishonesty, fraud, theft, embezzlement, misappropriation or breach of a duty of loyalty" and "soliciting or attempting to solicit any client of the other party without the written permission of such party."

Either party could terminate the Agreement without cause on 10 days notice. The Agreement specified:

> In the event this Agreement is terminated without cause by either party, Luchs and Pro Tect shall each be entitled to receive their respective shares of the commissions received pursuant to any player contract or endorsement agreement for the Players for as long as either [Pro Tect] or Luchs (or any other company with which Luchs becomes affiliated) continues to represent any of the Players. Luchs agrees to remit any amounts covered by the Agreement received directly by him from any of the Players, or otherwise, to Pro Tect, which agrees to make the appropriate distribution thereof pursuant to the terms of this Agreement.

At the time Luchs signed the Agreement, he considered it important that he be entitled to receive funds after he left Pro Tect because the majority of money generated by a player would come from the player's second or third contract. A rookie's contract is typically much smaller than a contract for a player who has been in the league for some years.

Luchs began working for Pro Tect in March 2000. The Agreement became effective May 15, 2000.

B. Recruiting Players

Over the next four years, Luchs successfully recruited, or participated in the recruitment of, many football players for Pro Tect. Several of the players recruited by Luchs were first round draft picks. Recognizing the prominence of those players, Pro Tect featured them on the covers of its marketing brochures.

Luchs testified he assisted Pro Tect recruit Travis Johnson, a first round draft pick out of Florida State. Luchs claimed that he arranged for Johnson to come to Pro Tect's offices to meet with Wichard and that on the day he quit, he and Wichard discussed that if they were successful in recruiting Johnson, Luchs would get the same commission set forth in their Agreement.

Wichard denied he told Luchs that Luchs would be paid commissions in connection with Johnson or any player signed after Luchs left. Wichard first signed

Johnson six months after Luchs quit. Luchs never requested that he be added to the standard representation agreement for Johnson as a co-agent. Wichard resided in Westlake Village, California, which was very close to Johnson's home in Oak Park. Wichard first met Johnson when Johnson was a star player in high school and Luchs had nothing to do with that meeting. When Luchs left Pro Tect, Johnson had not yet played in his last college season. College players who show the ability to play in the NFL get bombarded by agents during their senior season. But for his pre-existing relationship with Johnson, Wichard would not have been able to sign Johnson. Many other agents, including Luchs, were recruiting Johnson up to the time he was eligible to sign with an agent.

In all, the contracts received by players recruited by Pro Tect which were subject to the Agreement exceeded $37 million. Based on those contracts, Pro Tect earned commissions in excess of $1 million.

C. Termination of The Agreement

Luchs was dissatisfied with the Agreement primarily because he was not receiving a salary or benefits. During his first 17 months, Luchs received no payment. Whenever Luchs requested a salary or benefits, Wichard rejected the request. Luchs was not permitted to take a draw against his future commissions.

Luchs felt handcuffed by Wichard who scrutinized Luchs' every action and refused to allow Luchs any initiative. Wichard dismissed relationships with new players that Luchs had spent months cultivating. Although Luchs approached Wichard, his concerns were never addressed. Luchs concluded he could never advance professionally at Pro Tect, and his financial concerns were compounded when he and his wife had a baby.

On August 18, 2004, Luchs terminated his relationship with Pro Tect without cause by tendering a letter of resignation. Prior to Luchs' resignation, Pro Tect had not terminated Luchs. The body of the resignation letter stated:

> Pursuant to paragraph 8 of the agreement dated May 15, 2000, between Pro Tect Management Corp. and Josh Luchs, this letter shall constitute 10 days written notice of termination of the agreement. [¶] Please forward all future payments pursuant to paragraph 9 of the agreement to my home address listed above. [¶] I'm glad to have worked with you and wish you the best of luck in all your future endeavors.

Luchs and Wichard understood that the Agreement required Pro Tect to continue paying Luchs his share of the commissions so long as the players were represented by either party. After giving notice, Luchs never received any payment from Pro Tect. Luchs repeatedly called Wichard regarding payment, but his calls were not taken or returned.

After resigning, Luchs accepted employment with Steve Feldman and continued representing professional athletes. Although a memorandum of understanding between Luchs and Feldman was dated August 16, 2004, the agreement was finalized in September 2004. According to Luchs, the August date reflected the date on which the memorandum was first generated.

Prior to this lawsuit, Wichard did not receive any invoices from Luchs claiming he was owed any money.

D. Two Players Terminate Their Relationship with Pro Tect

After leaving Pro Tect, Luchs maintained relationships with football players he had recruited while they were in college, including Keenan Howry and Rodney Leisle. Luchs did not tell either player that he had left Pro Tect.

Wichard testified he understood the players were to remain Pro Tect's clients if the Agreement was terminated, but Luchs had Howry and Leisle fire Wichard and then Luchs signed those players so he could represent them. Under the Agreement, the only way any player who had signed with Pro Tect could permissibly sign with Luchs would be with Wichard's written approval. Wichard stated he was damaged by being fired. Luchs instructed Howry and Leisle as to what they needed to do to fire Wichard, including what language needed to be in the letter to Wichard.

Luchs claimed he never solicited Howry or Leisle, but was simply facilitating the desire of clients who called him and asked him to represent them. According to Luchs, when Howry and Leisle later learned of Luchs' resignation, each player resolved to keep Luchs as his agent. Each player independently asked Luchs how to terminate Pro Tect. Luchs explained the information which needed to be included in a termination letter, and in December 2004, both Howry and Leisle terminated their contracts with Pro Tect. After Howry and Leisle terminated Pro Tect, they retained Luchs to represent them in their professional football careers.

Even though Howry and Leisle terminated their relationship with Pro Tect, Luchs understood that did not affect his obligation under his Agreement with Pro Tect to forward to Pro Tect all commission payments for those two athletes and that 75 percent of those commissions belonged to Pro Tect.

E. The Howry Check

In November 2004, Howry received Pro Tect's annual fee invoice, and Luchs directed him to issue a check to Pro Tect. In January 2005, Howry gave Luchs a check made out to Pro Tect in the amount of $5,320.59 for commissions due to Pro Tect. Luchs was aware the Agreement required him to remit to Pro Tect any checks he received directly from a player. Luchs claimed he did not remit the check to Pro Tech because he learned Pro Tect had been dissolved.

Because Luchs was uncertain what to do with Howry's check, he forwarded it to his attorney. Luchs was aware his attorney would deposit the check into a client trust account. Pro Tect did not receive a check from Howry for the 2004 season. At Luchs' first deposition, he erroneously testified he had forwarded all relevant checks to Pro Tect. At Luchs' second deposition, he claimed he had failed to mention he had forwarded the Howry check to his attorney because he was overwhelmed by the questioning and simply forgot.

Prior to the inception of this litigation, the Howry check was the only check Luchs received from an athlete following his resignation from Pro Tect. Luchs sent all the other checks directly to Pro Tect. The following season, after commencing this litigation, Luchs sent other checks to Pro Tect even though he had no information suggesting the corporation had been revived.

The court issued a sanction about the check, stating Luchs gave the check to his attorney, the attorney deposited the check into a trust account on Luchs' behalf and with his knowledge, the attorney acted within his authority and/or Luchs ratified those acts, and Luchs was precluded from introducing evidence to the contrary at trial.

F. Luchs' Claim

As of the date of Luchs' resignation, Wichard had paid Luchs all the commissions due to Luchs. At trial, Luchs acknowledged he was not making any claims for anything prior to his resignation.

Following Luchs' resignation, Pro Tect continued to send out invoices and receive commissions in which Luchs had a financial interest.

For example, Chris Cooley and Rodney Leisle made payments to Pro Tect in late 2004. Wichard testified he and Luchs discussed the fact Luchs would not be receiving any fees for 2004 because the expenses for which Luchs was responsible pursuant to the Agreement outweighed the small commissions Luchs would have received for those two

players whom Luchs had helped recruit that year. Luchs testified he was never told by anyone at Pro Tect about those expenses.

Luchs was very upset and repeatedly attempted to contact Wichard without success. In late 2004, Luchs retained an attorney who sent Pro Tect a letter demanding payment for all the players in which Luchs had a financial interest. Counsel for Pro Tect responded that Luchs' decision to compete with Pro Tect constituted a breach of their Agreement and extinguished Pro Tect's obligation to pay Luchs.

Wichard dissolved Pro Tect in 2002, and the company was forfeited in California when it failed to pay its fees. Wichard never told Luchs he had dissolved Pro Tect. Even though Wichard knew Pro Tect had been dissolved, he still had Pro Tech brochures and promotional materials printed. In Wichard's view, Pro Tect had not really been dissolved. Luchs was simply providing services to him (Wichard) because he was Pro Tect. Wichard was the sole shareholder of Pro Tect. For that reason, when Wichard prepared the standard representation agreements, he would interchangeably use his name and the company name even though he was the contract advisor.

The parties stipulated the value of Luchs' compensation for the players he recruited under the Agreement was $146,309.91. Luchs also sought compensation, based on the oral agreement, for his recruitment of Travis Johnson. Luchs claimed he was owed $90,406.84 for Johnson.

II. Procedural Background

In April 2005, Luchs filed his first amended complaint asserting nine causes of action against Pro Tect and Wichard. The defendants filed a joint answer. The court sustained Luchs' demurrer to Pro Tect's answer without leave to amend, denied defendants' motion to reconsider and entered a default against Pro Tect on the basis it was a forfeited corporation. The court refused to enter a default judgment against Pro Tect.

Luchs proceeded to trial against Wichard on three counts: (1) breach of written contract, (2) breach of oral contract, and (3) fraud. The court instructed the jury that Wichard and Pro Tect were one and the same. The jury returned a defense verdict for Wichard, finding he had not breached the written or oral agreements with Luchs or made a misrepresentation or concealed a material fact from Luchs. The court denied Luchs' motions for new trial and judgment notwithstanding the verdict and entered judgment for both Wichard and Pro Tect.

Wichard filed a motion for attorney's fees and received an award of $381,687.50.

Luchs filed timely notices of appeal from the judgment and the order awarding attorney's fees. This court consolidated the appeals.

DISCUSSION

I. Default judgment

After a default was entered against Pro Tect, Luchs attempted to obtain a default judgment against Pro Tect on the grounds it was a forfeited corporation and could not defend itself. Defendants moved to stay entry of a default judgment. Citing *Adams Mfg. & Engineering Co. v. Coast Centerless Grinding Co*. (1960) 184 Cal.App.2d 649, the court ruled no default judgment could be entered until the answering defendant (Wichard) had had an opportunity to present his defenses to the case on the merits. Luchs contends the court's ruling was error.

Generally, "'the entry of a default terminates a defendant's rights to take any further steps in the litigation until . . . the default is set aside.'" (*In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1037.) Moreover, the "default admits the allegations of the complaint." (*Sporn v. Home Depot USA, Inc*. (2005) 126 Cal.App.4th 1294, 1303.)

However, "[t]he rule is definitely established that where there are two or more defendants and the liability of one is dependent upon that of the other the default of one of them does not preclude his having the benefit of his codefendants establishing, after a

contested hearing, the nonexistence of the controlling fact; in such case the defaulting defendant is entitled to have judgment in his favor along with the successful contesting defendant." (*Adams Mfg. & Engineering Co. v. Coast Centerless Grinding Co*., *supra*, 184 Cal.App.2d at p. 655.)

Luchs argues that exception does not apply here because his action was against Pro Tect and its alter ego Wichard and there were no allegations of joint liability as in *Adams*. Luchs not only sued both Wichard and Pro Tect for breach of contract, but also he alleged that Pro Tect was the alter ego of Wichard (i.e., Wichard executed the Agreement on behalf of and as president of Pro Tect and any separateness between the two had ceased to exist) and defendants breached the Agreement by failing to pay Luchs the commissions he was owed. Such allegations are sufficient to establish Pro Tect's liability was dependent upon the liability of Wichard, and as such this case falls within the *Adams* rule. (See discussion of application of the rule where a principal and his agent were sued for a tort in *Adams Mfg. & Engineering Co. v. Coast Centerless Grinding Co*., *supra*, 184 Cal.App.2d at pp. 655-656; see also *Doney v. TRW, Inc.* (1995) 33 Cal.App.4th 245, 249, "Alter ego is essentially a theory of vicarious liability under which the owners of a corporation may be held liable for harm for which the corporation is responsible . . . ." (Italics deleted.).)

Thus, Pro Tect was also entitled to have judgment entered in its favor, and the court properly did so.

II. Instructions

Luchs contends the court erroneously instructed the jury regarding the legal relationship between Pro Tect and Wichard. This court reviews de novo the validity of jury instructions. (See *Mattco Forge, Inc. v. Arthur Young & Co*. (1997) 52 Cal.App.4th 820, 831.)

Luchs argues the court improperly instructed the jury: "For the purposes of this trial you are instructed that the defendant, Gary Wichard and the Defendant, Pro Tect Management Corporation, are one and the same. If you find for one defendant you necessarily must find for the other." When Wichard advised the court he would stipulate Pro Tect and Wichard were one and the same, Luchs objected that even though Wichard was the alter ego of the corporation, they were different and not the same.

Luchs also asserts the court improperly refused to instruct the jury that:

> During the trial, I explained that certain evidence could be considered as to only one party. You may not consider the evidence as to any other party. [¶] During the trial, I explained that certain evidence could be considered as to one or more parties but not to every party. You may not consider that evidence as to any other party.
>
> Defendant Gary Wichard is not a party to the written contract between Plaintiff Joshua Luchs and defendant Pro Tech Management Corporation. Defendant Gary Wichard cannot assert any legal rights in connection with that written contract, including any defenses to that written contract.

According to Luchs, he alleged Wichard acted in his individual capacity and as an officer of Pro Tect; for example Luchs claims that when Wichard represented Pro Tect was a viable company when it was not, that representation could not be attributed to Pro Tect, meaning that the defendants were not one and the same. Moreover, Luchs asserts that Pro Tect was not Wichard's alter ego when Wichard acted in his individual capacity or outside the scope of his office.

Luchs argues that because he and Pro Tect were the only parties to the Agreement, Wichard lacked standing to enforce its terms or offer a defense on behalf of Pro Tect. As Luchs sued Wichard for breach of contract, it is nonsensical to argue Wichard could not enforce its terms. Luchs proceeded to trial only against Wichard, who agreed to be personally responsible for any judgment against Pro Tect. Luchs states the jury rendered a verdict in favor of a defaulting defendant who was not entitled to defend itself. On the

special verdict form, the jury found that Wichard did not breach the Agreement and that Wichard did not make a misrepresentation or conceal a material fact from Luchs. The jury made no findings about Pro Tect; rather the court entered judgment for Pro Tect under *Adams* based on the findings about Wichard.

Luchs argues the prohibition against soliciting Pro Tect's clients did not apply once the Agreement was terminated without cause as it was. The jury disagreed by finding Wichard did not breach the contract.

For the first time on appeal, Luchs claims that after his resignation, the prohibition in the Agreement against soliciting Pro Tect's clients was void pursuant to Business and Professions Code section 16600.[2] That non-solicitation provision is not a broad covenant not to compete. (See *Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, 946.) As Luchs did not raise this theory in the trial court, we conclude allowing him to assert a new theory on appeal would be unfair to the trial court and opposing counsel, especially after a jury trial. (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316; *People ex re Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 46.)

Thus, there was no instructional error.

III. Substantial Evidence

Luchs contends the finding that Wichard did not breach the Agreement was not supported by substantial evidence because the parties agreed that after Luchs resigned, Pro Tect did not continue to pay him and the jury did not resolve the question of whether Pro Tect's failure to perform was excused by his prior breach.

"'In reviewing the evidence on . . . appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the

---

[2] Section 16600 provides, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'" (*Alderson v. Alderson* (1986) 180 Cal.App.3d 450, 465.)

At trial, Wichard argued that because Luchs solicited Pro Tect's clients and misappropriated funds (i.e., the Howry check) after his resignation, he forfeited the right to future commissions. Though Luchs testified he did not solicit Pro Tect's clients and offered an explanation as to why he gave the Howry check to his attorney who in turn deposited the check in a client trust account, the jury was entitled to disregard his testimony and could make reasonable inferences to the contrary. As the court noted in denying Luchs' motion for new trial, "The contract at issue could be terminated for 'cause.' . . . The Court finds the record sufficiently supports termination for cause, as there was evidence plaintiff solicited defendant's clients without permission and misappropriated funds. The contract further states plaintiff forfeits his right to future commissions if the contract is terminated based on plaintiff's conduct constituting cause."

Luchs, who admitted he had been paid all the commissions he was due prior to his resignation, points to no evidence that any commission was due to him prior to his soliciting Pro Tect's clients. Although Luchs refers to commissions due from Cooley and Leisle, Wichard adduced evidence the expenses for which Luchs was responsible exceeded any commission due to Luchs for Cooley and Leisle, the two players for whom Luchs was eligible for a commission for 2004. Accordingly, Luchs' breach terminated the contract prior to any obligation by Wichard to pay future commissions to Luchs.

IV. Attorney's Fees

Luchs contends the court erroneously awarded attorney's fees to Wichard because he was not the prevailing party and because he was a nonsignatory to the Agreement and would not have been liable for Luchs' fees had Luchs prevailed.

A. Prevailing Party

"[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.'" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.)

Luchs argues there was no prevailing party because Wichard had filed a cross-complaint asserting a contract claim and the court sustained Luchs' demurrer to the cross-complaint without leave to amend -- a complete victory for himself. The court denied defendants' motion to file a second amended cross-complaint adding Wichard as a cross-complainant and asserting in part that cross-complainants had been damaged by $100,000 by Luchs' breach of the Agreement. Luchs did not argue Wichard was not the prevailing party in the trial court.

The court found Wichard was the prevailing party on the contract as his "objectives were more than adequately achieved, as he defeated claims in excess of one million dollars." Luchs has not shown the court abused its discretion in making that determination. (See *Scott Co. v. Blount, Inc*. (1999) 20 Cal.4th 1103, 1109 [Even if neither party achieves a complete victory on all the contract claims, it is within the court's discretion to determine which party prevailed on the contract.].)

B. Nonsignatory

"""[I]n cases involving nonsignatories to a contract with an attorney fee provision, the following rule may be distilled from the applicable cases: A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed."""" (*Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 341.)

Generally, if Luchs had proved Wichard was the alter ego of Pro Tect, Wichard would have been liable for attorney's fees if Luchs had prevailed on his breach of contract cause of action. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128-129.) Luchs posits he could not get a judgment against Wichard on the basis of alter ego because Wichard could not be added to a default judgment (see *NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 779) so Wichard would not have been liable for Luchs' fees had Luchs obtained a default judgment against Pro Tect, meaning Wichard was not entitled to attorney's fees. However, Wichard agreed to be personally liable for any judgment against Pro Tect.

Accordingly, the court's award of attorney's fees to Wichard was not erroneous.

DISPOSITION

The judgment and order are affirmed. Wichard to recover costs on appeal.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**